UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13

SEARS, ROEBUCK AND CO.,	)	
	)	
Respondent,	)	
	)	
and	)	**Case 13-CA-191829**
	)	
LOCAL 881 UNITED FOOD AND COMMCERICAL WORKERS,	)	
	)	
	)	
Charging Party.	)	
	)	

BRIEF OF LOCAL 881 UFCW

This Brief is submitted on behalf of Local 881 United Food and Commercial Workers ("Local 881" or "Union") pursuant to § 102.42 of the Boards Rules and Regulations.

PROCEDURAL BACKGROUND

On November 30, 2015, the National Labor Relations Board ("Board") certified Local 881 as the exclusive collective barging representative of a unit consisting of full-time and regular part-time Back Room Associates (the "Unit") at Sears, Roebuck and Co.'s ("Sears" or "Employer") facility located at 6501 West 95th Street, Chicago Ridge, Illinois (R. Ex. 1). On December 2, 2016, Sears, by letter from Jim Wingfield ("Wingfield"), a manager for Sears's Labor Relations Department, withdrew recognition of Local 881 as the exclusive collective-bargaining representative of the Unit (G.C. Ex. 3). Thereafter Local 881 filed an unfair labor practice charge against Sears alleging it unlawfully withdrew recognition from Local 881 in violation of §§ 8(a)(1) and (5) of the Act. (G.C. Ex. 1(a)).

The Board issued a Complaint against Sears on May 31, 2017, alleging that it "solicited, supported, and assisted in the initiation and signing" of a decertification petition, and that Sears

provided more than ministerial assistance in facilitating the signing of the decertification petition in violation of § 8(a)(1) of the Act (G.C. Ex. 1(c)). The Complaint further alleges that by withdrawing recognition Sears did not bargain in good faith within the meaning of § 8(d) and in violation of §§ 8(a)(1) and (5) of the Act (*Id.*). On June 30, 2017, an amended Complaint alleged that by unilaterally withdrawing recognition absent the results of a Board election, Sears violated §§ 8(a)(1) and (5) of the Act. (G.C. Ex. 1(f)). Thereafter, an unfair labor practice hearing was held before a Hearing Officer on March 12, 2018, with all parties being present.

STATEMENT OF FACTS

1. Testimony Regarding the Decertification Petition.

In October 2016, the Unit at Chicago Ridge had approximately 15-20 employees. In late October or early November 2016, Barbara Gregory ("Gregory"), a Unit employee, had a conversation with Michael Carter ("Carter"), another Unit employee, about the Union (Tr. 32). The conversation took place in the mid-morning and in front of other employees in the Unit (*Id.*). Carter expressed that he was confused about the Union and did not know what to do with all the talk about the Union (Tr. 33-35).[1]

It was common knowledge that Gregory did not support the Union (Tr. 63). She testified that after the Union won the election she still voiced her dissatisfaction with being represented by a union (Tr. 65). However, Gregory explained that she was not entirely against Local 881, but instead did not want the Union because she was comfortable with her wages, hours and working conditions (Tr. 139-140, 143). She further explained that she was not intimidated by Union supporters at the Chicago Ridge location (Tr. 143).

[1] Gregory testified that she believes Carter has autism (Tr. 36).

A day or two after she spoke to Carter, Gregory spoke to Anthony Harris ("Harris"), Chicago Ridge Store Manager (Tr. 35-36). The conversation took place in the morning, and Gregory and Harris were the only persons in the office (Tr. 36). Gregory asked Harris if there was anything they could do to protect the autistic employees from the Union because they were confused (Tr. 36). Gregory testified that Harris said he would have to speak to corporate and then he would get back to her (Tr. 36).

A day or two after their initial meeting, Gregory again met with Harris alone in his office (Tr. 37-38). According to Gregory, Harris told her there was a form the employees could sign if they no longer wanted to be associated with the Union (Tr. 37-38). Harris then told Gregory that he would not be at the office the following day, but the form would be left in the top drawer of his desk for her (Tr. 38). The next day, November 8, Gregory found a decertification petition in the top middle drawer of Harris's desk (GC Ex. 2; Tr. 38). When she found the petition, Gregory testified there was already writing on the petition, and that someone had filled out the spaces identifying Local 881 and Sears (G.C. Ex. 2; Tr. 40-41).

Gregory retrieved the petition and took it to the "merchandise pickup area" where other employees were working (Tr. 42). She asked employees to sign the decertification petition and placed the petition on a table for them to sign (Tr. 42-43). Seven employees, including Gregory, signed the petition on November 8. On November 10, Gregory collected an eighth signature (Tr. 50). She testified that immediately after she had the eighth signature she went to Harris's office and placed the petition in the top middle drawer of his desk (Tr. 51-52). Harris was not in his office when she placed the petition in his desk (Tr. 52). Gregory testified that she did not discuss the petition with Harris after she placed it in his desk drawer (Tr. 52).

Harris testified that in 2016 he had three or four conversations with Gregory regarding the Union (Tr. 101). In late October or early November Harris and Gregory spoke in his office about the Union (Tr. 105). He claimed that during this conversation Gregory asked how to make the Union go away (Tr. 103-04). Harris, who had previous managerial experience with organized labor, claimed that he told her there was a process to make the Union go away, but as a member of management he could not be involved the decertification process (Tr. 103-04). He further testified that he told her to Google the decertification process (Tr. 104).

Harris said that the next time he discussed the Union with Gregory was after he pulled the decertification petition from his desk drawer (Tr. 107-08). Harris claims that he did not give the decertification petition to Gregory through direct or indirect means (Tr. 107). He further claimed that he found the petition in his top middle drawer shortly after Thanksgiving on November 29. (Tr. 109). However, after he found the petition he called Gregory to his office to confirm she wanted to advance the petition (Tr. 109).

In 2016 Donald Strand ("Strand") was Sear's Senior Director of Labor Relations (Tr. 89). He received the decertification petition from Jim Wingfield ("Wingfield"), a manager for Sears's Labor Relations Department (Tr. 90). On December 1, 2016, Strand verified the names on the petition against an HR database (R. Ex. 3). Thereafter, he authorized Wingfield to submit the withdrawal of recognition letter to Brad Powell ("Powell"), Local 881's Bargaining Representative (G.C. Ex. 3).

Karla Sanchez ("Sanchez"), an associate attorney at Seyfarth Shaw LLP, testified that she interviewed Gregory in the course of investigating this matter for Sears (Tr. 130). Sanchez testified that Gregory said Harris would speak to Sears's legal department and discuss the option of

decertification (*Id.*). Sanchez then claimed that Gregory told her Harris gave her the decertification petition in person (*Id.*).

2. Testimony Regarding Bargaining Sessions.

Bargaining between Local 881 and Sears began in February 2016 (Tr. 68). Bargaining sessions occurred once a month, and generally began on a Tuesday and lasted until Thursday (Tr. 79-80). The last bargaining sessions between Local 881 and Sears were November 8 - 9, 2016 (Tr. 69). At that time the parties were nearing the end of bargaining and had multiple tentative agreements (Tr. 69). Harris and Wingfield represented Sears during the bargaining sessions.[2]

Powell first learned that the decertification petition was being circulated on company time during the bargaining session on November 9 (Tr. 82, 84). At a sidebar with Wingfield and Harris, he expressed his disappointment that there were rumors of a decertification petition circulating amongst the employees (Tr. 82-83). Wingfield and Harris denied they knew about the decertification petition (Tr. 111).

ARGUMENT

1. Sears Unlawfully Withdrew Recognition from the Union and Refused to Bargain.

Sears violated §§ 8(a)(1) and (5) of the Act by unilaterally withdrawing recognition from the Union.

Absent special circumstances, the presumption of a union's majority support is conclusive for a period of one year after certification. *Latino Express, Inc.*, 2013 NLRB LEXIS 676, *57 (N.L.R.B. October 30, 2013), citing *Chelsea Industries*, 331 NLRB 1648, 1648 (2000), enforced 285 F.3d 1073, (D.C. Cir. 2002) ("To foster collective bargaining and industrial stability, the Board has long held that a certified union's majority status ordinarily cannot be challenged for a period

[2] Harris testified that he was not at the Chicago Ridge location on November 8-10.

of one year"). After the expiration of the certification year an employer can show a union has lost majority support with objective evidence. *Levitz Furniture Co*., 333 NLRB 717, 725 (2001). However, when an employer withdraws recognition it does so at its own peril. *Levitz Furniture Co*., 333 NLRB at 725 (an employer's failure to prove it lawfully withdrew recognition is a violation of § 8(a)(5)).

The conclusive presumption of majority support during the first year is more strictly enforced than other bars to question representation. *Latino Express*, 2013 NLRB LEXIS at *57. As such, proof of loss of majority support justifying an employer's withdrawal of recognition may not be demonstrated by a decertification petition circulated during the certification year. *Latino Express*, 2013 NLRB LEXIS at *66-67. Moreover, whether an employer knew the petition was circulated during the certification year is irrelevant to find that an employer violated the Act by withdrawing recognition. *Latino Express*, 2013 NLRB LEXIS at *64-65, ("whether or not the [employer] knew of the petition during the certification year, it is precluded from relying on it to withdraw recognition after the expiration of the certification year").

The record evidence is indisputable that Sears violated the Act. Gregory solicited all of the signatures on the decertification petition between November 8 and November 10, well before the end of Local 881's certification year and presumption of conclusive majority support. As such, Sears's reliance on this petition and subsequent unilateral decision to withdraw recognition from Local 881 is a violation of the Act. Moreover, under *Latino Express* it is irrelevant whether Sears knew the petition was circulated before the end of the certification year to find it violated the Act. Sears withdrew recognition at its own peril, and in the instant matter its reliance was based on a prohibited petition.

Accordingly, Sears violated §§ 8(a)(1) and (5) of the Act by unilaterally withdrawing recognition from Local 881.

2. <u>Sears Unlawfully Facilitated the Decertification Petition and Refused to Bargain</u>.

Sears violated §§ 8(a)(1) and (5) when it refused to bargain with Local 881 based on a decertification petition it promoted and facilitated.

a. Credibility Should be Weighed in Gregory's Favor.

Harris claimed Gregory initiated contact to decertify the Union and that he did not give her the decertification petition. However, Gregory denies this and testified that Harris initiated conversation about decertifying Local 881 and left her the petition to circulate, and that she talked to Harris about the autistic workers. For the following reasons, credibility should be resolved in favor of Gregory and against Harris.

First, Gregory had no reason to testify that Harris initiated conversation about decertifying Local 881 and leaving her a petition to circulate. In this regard, she has never been a supporter of Local 881, and she is still Sears's employee and Harris is still her boss. There is simply no reason for Gregory to testify adversely to Sears's and her own interests other than to do so truthfully.

In this regard, Gregory did not think the Union would help her, and there is no reasonable explanation as to why she would fabricate testimony if she believed it was against her best interests. Moreover, Gregory was clear that the Unit employees who supported the Union did not intimidate her and that she did not feel threatened. Accordingly, Gregory is a neutral in this matter while Harris and Sears are not.

Second, the dates when Gregory entered Harris's office to collect the petition on November 8 and to and put the petition back in his desk coincide with the dates Harris was not at the Chicago Ridge location. This is significant because Harris gave Gregory instructions to go into his desk

drawer on days he knew he would be away in order to give the appearance that he did not facilitate the petition.

Third, Harris's claim that he found the petition in his desk after Thanksgiving is not credible. Gregory testified, and the petition supports, that she had all of the signatures by November 10. Given the haste Gregory exhibited in collecting the petition signatures it is not believable that she would wait over two weeks to give Harris the petition. Moreover, it is surely not believable that it took Harris over two weeks to find the petition in his desk given that he uses the drawer two or three times a day (Tr. 109).

Finally, Gregory did not know how to decertify the Union without Harris's support. She did not even know the name of the Union. Harris, on the other hand, had years of experience in labor relations, including union represented facilities and, undoubtedly, knew how to decertify a union.

In the end, it is not credible that Gregory learned how to decertify the Union through an internet search, and then delayed submitting the petition until November 29, one day before the end of the certification year. Gregory was inexperienced in labor relations, while Harris had labor relations experience.

Additionally, little weight should be given to Sanchez's testimony. Sanchez testified that during her investigation for Sears, Gregory said Harris gave her the petition in person. Sanchez did not provide her notes or other corroborating materials from her interview with Gregory. Moreover, Gregory's statements to Sanchez were not under oath, at a trial, hearing or deposition, nor was opposite counsel given the opportunity to cross-examine her at the time of questioning. *Printer Bros., Inc.* 227 N.L.R.B. 921, fn. 17 (1977) (Prior statements that do not satisfy FRE

801(d)(1)(A) cannot be taken for the truth of the matter asserted).[3] Accordingly, Sanchez's hearsay testimony should be given little weight and cannot be considered for the truth of the matter asserted.

Moreover, when Gregory was asked to clarify Sanchez's statements she testified that she did not recall telling Sanchez that Harris gave the petition to her directly, and if she did give that answer she must have misunderstood Sanchez's question (Tr. 137-38).

b. Sears Facilitated the Decertification Petition and Refused to Bargain with Local 881.

It is a violation of § 8(a)(1) for an employer to assist employees in circulating or promoting a decertification petition. *Craftool Mfg. Co.*, 229 NLRB 634, 637 (1977). Moreover, it is a violation of § 8(a)(5) for an employer to refuse to bargain based on a decertification petition that is tainted by the employer's § 8(a)(1) violation. *Craftool Mfg. Co.*, 229 NLRB at 638 (1977); see also *Weisser Optical Co.*, 274 NLRB 961, 961-62 (1985) ("the Respondent could not rely on the tainted showing-of-interest petition in asserting a good-faith doubt concerning the Union's majority status, and its withdrawal of recognition from the Union and refusal to bargain . . . violated Section 8(a)(5)").

The credible evidence supports a finding that Harris provided more than ministerial support in promoting and circulating the decertification petition. In *Craftool,* the Board held that a supervisor initiating contact with employees and providing employees with a precise course of action to decertify a union provided more than ministerial support and violated §§ (a)(1) and (5) of the Act. *Craftool Mfg. Co.*, 229 NLRB at 636-37 ("[the supervisor] suggested a precise course of action which clearly indicated [the employer's] sponsorship and support despite its admonition

[3] Ms. Robles made a timely objection to Sanchez's testimony (Tr. 130-31).

that it could not "assist" employees."). Harris's actions paralleled the supervisor's actions in *Craftool*.

First, Harris initiated decertification discussions with the Gregory. When Gregory originally went to Harris's office she expressed concern about protecting the autistic workers. She did not ask Harris how to remove the Union or how to reduce support for Union. It was Harris who first proposed the idea of decertifying the Union by telling her there was a way to remove Local 881.[4] Second, during their November 8 meeting, Harris told Gregory that he would leave a form for her in his desk (Tr. 37-38). Gregory did not ask for the form, nor did she know how to decertify a union until she pulled the decertification petition from Harris's desk drawer (Tr. 135). Finally, when Gregory took the petition from Harris's desk on November 8 the top sections of the petition identifying Sears and Local 881 were already filled out. Gregory did not even know the name of the Union at the time and did not have the knowledge to prepare a decertification petition on her own. Harris, who was experienced in labor relations, undoubtedly had the petition prepared and filled out for her.

In the end, by promoting and facilitating the decertification petition, Harris's actions greatly exceeded lawful ministerial aid. Accordingly, Sears's unlawful coercive conduct in facilitating the petition and subsequent refusal to bargain violated §§ 8(a)(1) and (5) of the Act.

[4] Harris's disclaimer that he could not assist Gregory because he is a member of management is negated by his initiating decertification discussions and leaving the filled-out decertification petition in his desk for her to collect. *Craftool Mfg. Co.*, 229 NLRB at 636-37 (The Board ignored the supervisor's disclaimer that he could not help the employees decertify the union in light of the supervisor's direct involvement with promoting and assisting employees circulate a decertification petition).

3. **The Hearing Officer Correctly Ruled that Sears is Not Entitled to the Union's Position Statement**.

In its subpoena, Sears requested the following documents:

> "All position statements and other documents submitted to the Region in Case No. 13-CA-191829. This request does not seek the production of any sworn statements or affidavit(s) provided to the NLRB or other Jencks statements."

(Respondent's Subpoena *Duces Tecum*, Attachment A). The Board's precedent regarding disclosure of position statements is clear. Position statements submitted to the Board in support of an unfair labor practice investigation are privileged under the attorney work-product doctrine. *Kaiser Aluminum & Chemical Corp*., 339 NLRB 829 (2003) (the Board quashed the respondent's subpoena to the extent it sought the charging party's positions statements); see also *Fred Meyer Stores, Inc.*, 2012 NLRB LEXIS 636 (2012) (finding that the judge clearly erred in requiring the charging party to produce two position statements in response to a subpoena *duces tecum*); see also *Unite HERE*, 357 NLRB 28, 41 (2011) (the Board expanded the *Kaiser Doctrine* to apply to a respondent's position statements).

Paragraph No. 1 of Sears's subpoena clearly conflicts with the Board's precedent as it requests Local 881's position statements submitted to Region 13 in support of its charge. Accordingly, the Hearing Officer correctly decided that Respondent was not entitled to Local 881's position statement.

CONCLUSION

For all the reasons argued herein, Local 881 UFCW respectfully requests that the Hearing Officer find that the Respondent, Sears violated §§ 8(a)(1) and (5) of the Act and order all appropriate remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of Local 881 UFCW's Brief by electronic filing, United States Postal Service and electronic mail on May 4, 2018, upon the following:

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